

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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PAUL D. CEGLIA,	:	
	:	
Plaintiff,	:	
	:	Civil Action No. 1:10-cv-00569-RJA
v.	:	
	:	DECLARATION OF
MARK ELLIOT ZUCKERBERG and	:	ALEXANDER H. SOUTHWELL
FACEBOOK, INC.,	:	
	:	
Defendants.	:	
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I, ALEXANDER H. SOUTHWELL, hereby declare under penalty of perjury that the following is true and correct:

1. I am an attorney licensed to practice law in the State of New York and admitted to practice before this Court. I am a partner in the law firm of Gibson, Dunn & Crutcher LLP ("Gibson Dunn"), counsel of record for Mark Elliot Zuckerberg and Facebook, Inc. ("Facebook") in the above-captioned matter. I make this declaration, based on personal knowledge, in support of Defendants' Omnibus Opposition to Ceglia's Six Motions.

Hard-Copy Document Inspections

2. This Court's July 1, 2011 Order (the "Order") granted Defendants' Motion for Expedited Discovery and authorized Defendants' inspection of certain hard-copy documents, including the so-called "Work for Hire" document. *See* Doc. No. 83.

3. On July 1, 2011, this Court also issued a Hard-Copy Document Inspection Protocol (the "Protocol"), which the parties jointly negotiated on the evening of June 30, 2011, and the morning of July 1, 2011. *See* Doc. No. 84.

4. Defendants' hard-copy document inspections occurred at the law offices of Harris Beach in Buffalo, New York, on July 14-16, July 19, and August 27, 2011. I personally attended several of these inspections; at least one defense counsel was present at each inspection.

5. I also attended Plaintiff's inspection of the hard-copy documents at the law offices of Edelson McGuire in Chicago, Illinois, on July 25, 2011.

6. Before, during, and after the parties' inspections, I engaged in numerous communications, including the exchange of telephone calls and e-mail, with Plaintiff's counsel, Paul Argentieri, Esq., and Plaintiff's then-counsel, Jeffrey Lake, Esq. I conferred with Plaintiff's counsel regarding the dates, times, and locations of the various inspections; the experts, attorneys, and other persons who were permitted to attend each inspection; the precise non-destructive and destructive testing that the parties intended to conduct, and the sequence in which that testing would be conducted; the parties' joint retention of a videographer, Robert Gianadda, and the visual documentation of each inspection; the parties' joint retention of security services to supervise the transportation of the hard-copy documents to and from each inspection; and many other aspects of the parties' respective inspections.

7. At no point before, during, or after the parties' inspections did Plaintiff's counsel, Plaintiff's experts, or anyone else suggest that Plaintiff contemplated the possibility of testing the hard-copy documents for fingerprints, let alone that Plaintiff intended to do so.

8. At no point before, during, or after the parties' inspection did Plaintiff's counsel, Plaintiff's experts, or anyone else suggest that Defendants' experts should wear or should have worn gloves at each and every moment during Defendants' inspection. Neither the Order nor the Protocol require or even consider the use of gloves during the inspections.

Ceglia's Designation of Kole Emails as Privileged Attorney-Client Communications

9. Pursuant to this Court's July 1, 2011 Electronic Asset Inspection Protocol (the "Electronic Asset Protocol") (Doc. No. 85), the computer forensics and electronic discovery firm Stroz Friedberg, LLC ("Stroz Friedberg") conducted an examination of the computers, storage devices, and other electronic assets produced by Plaintiff.

10. Pursuant to paragraph 4 of the Electronic Asset Protocol, before Stroz Friedberg disclosed any electronic items to Defendants, Stroz Friedberg provided those items to Plaintiff's counsel, so that Plaintiff's counsel could conduct a privilege review.

11. On or about July 27, 2011, Stroz Friedberg provided to Plaintiff several electronic files that it had identified as Presumed Relevant Material pursuant to the Electronic Asset Protocol. Among those files were two emails sent from the e-mail account ceglia@adelphia.net to the email account jkole@sidley.com, dated March 3, 2004 (the "Kole Emails"). In the first Kole Email, which has a Subject line that reads "page 1 of 2 for Streetfax contract w mark," Ceglia wrote: "Hi Jim, Hope all is well, I am at 727 490 5751 when your ready. Ill send page two next I should be here for the next hour. Paul." The Kole Emails attached pages one and two of the authentic contract between Zuckerberg and StreetFax, which concerns only the StreetFax website and has nothing to do with Facebook. True and correct copies of the Kole Emails with attachments are attached hereto as Exhibit A.

12. On the afternoon of August 2, 2011, Plaintiff's former counsel Nathan Shaman sent Defendants and Stroz Friedberg a privilege log, a true and correct copy of which is attached hereto as Exhibit B.

13. In that privilege log, Plaintiff specifically designated the Kole Emails as attorney-client privileged communications. Plaintiff described each of the Kole Emails as "March 3, 2004

email from Paul Ceglia to his attorney Jim Kole, Esq." Ex. B at 1. Plaintiff labeled each of the Kole Emails as "Attorney-client privileged pursuant to N.Y. C.P.L.R. 4503." *Id.*

14. Among the 120 electronic files and artifacts that Stroz Friedberg provided to Plaintiff on or about July 27, 2011, Plaintiff designated only the Kole Emails as attorney-client privileged communications.

15. On August 12, 2011, this Court held that the Kole Emails are neither privileged attorney-client communications nor confidential under the Joint Stipulated Protective Order. *See* Decision and Order (Doc. No. 107) at 2-3, 6.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 28th day of November, 2011 at New York, New York.

A handwritten signature in black ink, appearing to read 'A. Southwell', is written over a horizontal line.

Alexander H. Southwell